

IN THE SUPREME COURT OF THE UNITED STATES

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JULIE HEIMESHOF, :

Petitioner : No. 12-729

V. :

HARTFORD LIFE & ACCIDENT :

INSURANCE CO., ET AL :

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Washington, D.C.

Tuesday, October 15, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

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of Petitioner.

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Petitioner.

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behalf of Respondents.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-729, Heimeshoff v. Hartford
5 Life & Accident Insurance.

6 Mr. Wessler.

7 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

8 ON BEHALF OF THE PETITIONER

9 MR. WESSLER: Thank you.

10 Mr. Chief Justice, and may it please the
11 Court:

12 This case involves an accrual provision in
13 an ERISA plan that starts the clock running on a Federal
14 denial of benefits claim near the beginning of ERISA's
15 mandatory internal claims process before the Federal
16 claim ever exists or could be filed in court.

17 This provision directly conflicts with
18 ERISA's two-tiered remedial structure, which is designed
19 to maximize the number of claims that are resolved
20 internally without lawyers in courts. The Respondent's
21 provision undermines this goal by making it impossible
22 for anyone to know in advance how much time will be left
23 on the limitations clock after the internal process is
24 complete.

25 JUSTICE GINSBURG: How much time was left in

1 this case?

2 MR. WESSLER: There was approximately one
3 year, Your Honor.

4 JUSTICE GINSBURG: And you -- and if there
5 were a one-year limitation running from the final
6 administrative review, you would be out?

7 MR. WESSLER: Well, I don't think we would
8 be out in this case, Your Honor, because the provision
9 in this case was a three year from final denial. Going
10 forward, if, in fact, ERISA plans had a one-year clock
11 running from final denial, everyone would know that they
12 would need to file their claim within one year from time
13 of final denial.

14 JUSTICE GINSBURG: Yes, but if there were
15 such a rule, one year from the final administrative
16 decision, this claim would become too late.

17 MR. WESSLER: If, in fact, the provision in
18 this plan --

19 JUSTICE GINSBURG: Yes. Yes.

20 MR. WESSLER: -- said one year from final
21 denial, that's correct, Your Honor.

22 JUSTICE GINSBURG: What accounts for the
23 delay? When the -- the clock was running and more than
24 a year went by before this suit was instituted, why was
25 that -- why did that happen?

1 MR. WESSLER: Well, I think this gets us,
2 Your Honor, to one of the core problems with this
3 provision, which is that it's confusing. It is unclear.
4 One of the key questions with these provisions, when
5 they're coupled with the mandatory exhaustion
6 requirement, that is -- that is actually quite uncertain
7 when proof of loss is due.

8 And so below, one -- one of the key
9 questions, which actually still remains unresolved, is
10 when the clock actually started ticking. But I think
11 there's a -- there's a more fundamental problem --

12 JUSTICE SOTOMAYOR: I'm sorry. I thought
13 the court below said that that was irrelevant to the
14 resolution of this case, that even if they accepted your
15 date for when the proof of loss started, that you would
16 still lose.

17 MR. WESSLER: In this case, Your Honor,
18 that's true; however, the problem with these proof of
19 loss dates coupled with this mandatory exhaustion
20 requirement is that it is unclear from the outset
21 when -- when the clock -- how much time after final
22 denial would be left when you're in the middle of the
23 process. And on this question of proof of loss --

24 JUSTICE SOTOMAYOR: I'm a little confused
25 because it would be the same no matter what rule we

1 instituted.

2 MR. WESSLER: Well, I -- I don't think
3 that's right, Your Honor.

4 JUSTICE SOTOMAYOR: Meaning, you would never
5 know when the administrative -- you really never know
6 when the administration process is final, just like
7 you're arguing you don't know when the proof of loss
8 date is final. But at least the advantage of proof of
9 loss, you know you got three years from at least the
10 beginning of the process.

11 MR. WESSLER: Right, although I -- there's
12 actually quite a bit of disagreement among the lower
13 courts about how you measure proof of loss, when that
14 date actually triggers the limitations clock.

15 So for instance, in the Seventh Circuit, the
16 court has held the proof of loss starts the clock
17 ticking the first time proof of loss is due under the
18 plan, which is the first set of documents that a
19 claimant actually provides to her plan supporting her
20 claim for disability.

21 The plan, however, through this internal
22 process, can come back and ask for more documents, more
23 evidence supporting the disability. And if the claimant
24 then provides those additional documents, that could
25 conceivably reset the limitations clock under this proof

1 of loss requirement.

2 JUSTICE SOTOMAYOR: That can only help you.
3 That can only help you. It gives you more time, but it
4 doesn't take time away from you.

5 MR. WESSLER: That's true, Your Honor.

6 JUSTICE SOTOMAYOR: You say you have three
7 years, no matter what. From the first date, you have
8 three years.

9 MR. WESSLER: Well, in fact --

10 JUSTICE SOTOMAYOR: If you need more time,
11 you have a potential out.

12 MR. WESSLER: Well, in fact, you don't have
13 necessarily three years from when proof of loss starts
14 because courts, as respondents themselves acknowledge,
15 are necessarily going to have to evaluate these -- these
16 provisions on a case-by-case basis. So it's --

17 JUSTICE SCALIA: Well, you know, I guess
18 there are answers to these -- to these legal questions,
19 whether it's the first filing or if supplemental
20 documents are required, it's the second filing. There's
21 an answer, you know? Some court will provide the
22 answer.

23 The mere fact that -- that provisions in a
24 contract are subject to various interpretations doesn't
25 make the provision invalid. It means something. We

1 just don't know right now what it means until -- until a
2 court provides the answer. But, wow, that's not
3 different from any contract.

4 MR. WESSLER: Well, except, Your Honor, that
5 in ERISA, one of the core goals of this statute is to
6 provide predictability, certainty, and efficiency in the
7 administration of benefits.

8 And so to have courts being placed in the
9 center of what should be a straightforward and
10 streamlined process undermines the way Congress intended
11 this benefits administration process to proceed. And if
12 you -- if you place courts exactly in the middle of
13 this, where they're going to necessarily be policing the
14 enforceability of a -- of a limitations provision before
15 they ever get to the question of were the benefits
16 properly denied, you're undermining the nature of what
17 this private process is supposed to be.

18 It was supposed to be intended to allow the
19 parties to privately resolve their benefit claims
20 without --

21 JUSTICE GINSBURG: But ERISA itself contains
22 no statute of limitations, and it's generally assumed
23 that, therefore, this State statute of limitations would
24 govern, and if a State has the position that parties can
25 contract the statute of limitations -- I mean, ERISA

1 does have -- does have a statute of limitations for
2 breach of fiduciary claims, right?

3 MR. WESSLER: That's -- that's correct, Your
4 Honor.

5 JUSTICE GINSBURG: And it has none for this
6 kind of claim.

7 MR. WESSLER: That's correct, Your Honor.
8 And I think it was reasonable for Congress to expect
9 that the -- that -- that for these denial of benefit
10 claims, we would look to State law to determine the
11 length of the period.

12 But when that period starts running -- and
13 that's -- that's what's at stake here, is when the
14 limitations clock starts running -- was not a question
15 that we would look to State law for; rather, it's a
16 question of Federal law. When does the claim actually
17 become ripe? When can you file it in court?

18 And -- and what -- what we have here is a
19 limitations provision that includes an accrual date that
20 starts the clock running, not just before when you can
21 file it in court, but before there's ever even been an
22 injury.

23 JUSTICE ALITO: Well, ERISA doesn't have a
24 statute of limitations, it doesn't specifically set out
25 a statute of limitations for this type of claim. But it

1 does have a savings clause that says it doesn't preempt
2 State laws that regulate insurance.

3 So what would happen in this situation?
4 Let's say that a State statute says essentially what the
5 plan at issue says. It says that a claim for the
6 incorrect denial of insurance benefits must be brought
7 within three years after the proof of loss.

8 And now let's assume we agree with you, that
9 under ERISA, any statute of limitations for the denial
10 of benefits must begin not when the proof of loss must
11 be filed, but upon the denial of benefits.

12 Does it follow, then, that the rule that
13 you're advocating would mean that ERISA preempted the
14 State law that regulated insurance in the way that I
15 just specified?

16 MR. WESSLER: I -- I would think it would,
17 because it -- because it would conflict with ERISA's
18 remedial structure. I would stress here that in this
19 case, we know that these State laws don't apply to
20 Respondent's provision. They themselves have made that
21 clear in their opposition brief.

22 Most State laws, however, actually include
23 language to the effect of that insurers can use these
24 kinds of proof of loss languages or something similar so
25 far as it's not any less favorable.

1 JUSTICE ALITO: Well, I think your answer to
2 that question has to be yes; otherwise, the situation
3 would be a mess.

4 MR. WESSLER: Yes. Yes.

5 JUSTICE ALITO: But I -- but in -- in what
6 sense is the law that I hypothesize not a law that
7 regulates insurance? So why wouldn't it fall within
8 ERISA's savings clause?

9 MR. WESSLER: It might as a first step, Your
10 Honor, but I think it would be impliedly conflicted
11 because it conflicts with the Federal structure of
12 ERISA. And the key point about these State law
13 provisions, which I think is where this provision comes
14 from in Respondent's plan, is that these State law
15 insurance regimes do not require mandatory exhaustion of
16 any internal claims process.

17 You -- your clock starts running at proof of
18 loss and so long as you wait a 60-day waiting period,
19 you can then file your claim in court regardless of
20 whether the insurer has actually acted on your claim.

21 That is not true here. Claimants do not
22 have the ability to file their claims in court until
23 they have exhausted this mandatory process.

24 JUSTICE KENNEDY: Is there any evidence in
25 other circuits that have this same rule that -- that the

1 approach the Respondents advocate has caused
2 difficulties and disruption and unfairness?

3 MR. WESSLER: Well, I think we have seen
4 courts struggling with a host of questions about how to
5 resolve the enforceability of these provisions. As just
6 an example, we know that courts are in the -- are having
7 now to be in the business of asking whether the parties'
8 conduct during this internal process has caused some
9 waiver or estoppel of the limitations provision.

10 That kind of inquiry, an estoppel kind of
11 inquiry, is a fact-based inquiry about whether the
12 plan's conduct in the internal process was unduly
13 reasonable --

14 JUSTICE KENNEDY: But in this case, as
15 Justice Ginsburg indicated at the outset, there was a
16 period of, I think, just over a year, in which it was
17 very clear that the administrative process had ended and
18 nothing happened. I don't see the unfairness in the
19 application of the rule in this case.

20 MR. WESSLER: Yes, Your Honor, but I think
21 the core problem here isn't so much one of unfairness as
22 it is certainty and predictability of what employees'
23 and plans' rights are under an ERISA plan.

24 JUSTICE KENNEDY: Well, but there is also
25 certainty and fairness in processing the claim, and when

1 evidence is lost, especially in cases where employees
2 who were key witnesses have likely departed, that's
3 another very important consideration.

4 MR. WESSLER: Absolutely, Your Honor. But
5 to be clear, there is nothing about Respondent's
6 provision that advances any of those goals any more than
7 running a limitations clock one year from final denial.

8 As this Court has said, the internal claims
9 process itself provides notice to all the parties about
10 the possibility for claims and, critically, preserves
11 all of the evidence that --

12 JUSTICE BREYER: What happens -- what
13 happens if you brought suit before the exhaustion, while
14 it was still going on, before it ended, but you said to
15 the judge, Judge, we're in the middle of exhausting, so
16 don't -- we don't want to hear the case until that's
17 finished, can you do that or not?

18 MR. WESSLER: I think that is a very open
19 question. I do not know the answer.

20 JUSTICE BREYER: It's an open question.

21 So then if it were held that you could do
22 it, you could file the lawsuit within the three years
23 and if exhaustion had not taken place, well, just don't
24 hear the case until the exhaustion is done. That would
25 solve your problem.

1 MR. WESSLER: I think it would, but I also
2 think --

3 JUSTICE BREYER: I mean, it wouldn't solve
4 your problem because you waited too long. But I mean
5 that would solve the problem of other people in the
6 future in your situation.

7 MR. WESSLER: Correct. It would create a
8 vehicle for protecting the claimant's rights and
9 providing certainty --

10 JUSTICE BREYER: What is it that stops that?
11 I mean, on that ground you would say these clauses are
12 valid. It's valid to say he has to -- you have to bring
13 a lawsuit within three years. Nothing wrong with that.
14 File a protective complaint.

15 MR. WESSLER: Absolutely, Your Honor. But
16 that gets lawyers and courts involved in a process that
17 should be private. ERISA's internal benefits process,
18 it processes millions of claims a year. If we have
19 lawyers turning what should be a non-adversarial,
20 private process into one that is adversarial and that
21 allows for the possibility of filing protective actions
22 in which we ask the Federal court to stay a potential
23 Federal claim that may never exist while we are in this
24 indeterminant, flexible process, the courts would be
25 brought directly into a process that should be private.

1 JUSTICE SOTOMAYOR: Counsel, if we rule in
2 your favor -- I'm sorry, against you -- and just say the
3 plans can do this, do you see any reason why the
4 government couldn't pass a regulation saying you've got
5 to give people at least a year from the end of the
6 administrative process to file?

7 MR. WESSLER: I can't speculate on what the
8 government would do. I don't actually know if they
9 would have the authority to do that.

10 JUSTICE SOTOMAYOR: I'm going to ask them
11 that question.

12 MR. WESSLER: I'm sure you are.

13 JUSTICE SOTOMAYOR: But are you aware of
14 anything that would stop them from doing that?

15 MR. WESSLER: I am not. Their regulations,
16 what they have now addresses the internal claims
17 process. It doesn't address the rights that exist when
18 you get to Federal court.

19 JUSTICE SOTOMAYOR: If we rule in your
20 favor, however, they would be estopped from passing a
21 regulation requiring something different than what we
22 say, correct?

23 MR. WESSLER: I would think that that's
24 right. I mean, I think -- I think a rule of accrual
25 that the limitations clock starts running at final

1 denial is exactly the kind of uniform and clean rule
2 that everyone can rely on ex ante, from the outset,
3 across the board in every jurisdiction in the country.

4 JUSTICE KAGAN: Mr. Wessler, this just I
5 think follows up on Justice Kennedy's question, but have
6 you identified any cases in which this serves to prevent
7 somebody from bringing a suit?

8 MR. WESSLER: We have not found any cases in
9 which a claimant has actually lost the right to file a
10 suit. The problem isn't so much in that possibility.
11 The problem is in what we do see, which is where there
12 are three or four or two or five months left after final
13 denial on the clock, and courts are now in the business
14 of having to evaluate, does that give enough time to the
15 claimant to do all the things that she needs to do to
16 file her claim?

17 JUSTICE KAGAN: But it seems as though those
18 courts have been pretty liberal in saying, whenever it
19 is necessary, no, take a little bit more time. So it
20 seems just a little bit like a solution in search of a
21 problem.

22 MR. WESSLER: I think in fact it's just the
23 opposite. Running the clock during the internal process
24 ex ante, no one knows where they will be at the end.
25 This process is indeterminate. We want the parties to

1 take all the time they need to work it out.

2 JUSTICE GINSBURG: I didn't understand your
3 response to Justice Breyer's question, Mr. Wessler. I
4 don't see how a Federal court who simply stays its --
5 stays its hand, abides the termination of the
6 administrative proceeding, is in any way engaging in any
7 kind of adversary process.

8 MR. WESSLER: With respect, Your Honor, it's
9 not the court that is engaging in the adversarial
10 process. It's the private internal claims process that
11 is supposed to be non-adversarial that has now become
12 adversarial because there is now a lawyer involved who
13 has advised her client that she must file a protective
14 action to avoid the possibility that she will lose her
15 claim. We don't --

16 JUSTICE GINSBURG: Yes, many people in the
17 administrative process aren't represented, but some are,
18 right?

19 MR. WESSLER: That's right, but we think
20 that this provision would incentivize more lawyers
21 getting involved because if you are uncertain about how
22 much time you'll have you will be in a position where
23 you want advice. This provision breeds confusion, and
24 when we are confused we look for help, and the help that
25 is going to come into this process are lawyers who are

1 going to take the kinds of strategic action that
2 Justice Breyer suggested and involve the courts in what
3 should be a private process.

4 That in and of itself drastically undermines
5 the point of this internal benefit administration and
6 just amplifies and magnifies the litigation costs
7 associated with it.

8 If I could reserve the rest of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Anders.

11 ORAL ARGUMENT OF GINGER D. ANDERS,

12 FOR THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONER

14 MS. ANDERS: Mr. Chief Justice, and may it
15 please the Court:

16 The limitations provision in Respondent's
17 plan deviates from bedrock Federal limitations
18 principles in a way that undermines ERISA's two-tiered
19 remedial framework. Congress enacted that remedial
20 structure, which requires mandatory exhaustion before
21 judicial review, against the established limitations
22 principle that the limitations period begins to run only
23 when the cause of action accrues, in other words, here,
24 when exhaustion is complete and the plan has rendered
25 its final decision.

1 JUSTICE ALITO: I find it very hard to
2 answer the question that is presented here without
3 knowing the answer to the preemption question that I
4 asked Mr. Wessler. And I know you refer to it in a
5 footnote in your brief and you say that this -- the type
6 of State statute to which I referred would likely be
7 preempted. And I can understand why you wouldn't want
8 to go further than that on that question in a case where
9 that question isn't squarely presented.

10 But if it's not presented, then I think we
11 would be creating an incredible mess that Congress would
12 not have intended. So I really don't understand how I
13 can answer the question here without knowing the answer
14 to the question there.

15 MS. ANDERS: I think that's -- I think
16 that's right and I think State laws that require plans
17 to have this sort of provision would be preempted. They
18 may fall within the savings clause, but, as this Court
19 has said, even statutes that are within the savings
20 clause are still subject to ordinary contract preemption
21 principles.

22 JUSTICE KENNEDY: Those are general
23 statutes, so they would be preempted just in this class
24 of claims. So lawyers would have to know that this
25 statute is still valid for many purposes, but not for

1 ERISA.

2 MS. ANDERS: Well, it may be valid for many
3 State law purposes, but when a plan is regulated by
4 ERISA, ERISA's remedial framework establishes the limits
5 of what that plan --

6 JUSTICE KENNEDY: But then you have -- you
7 have lack of uniformity within the State on when these
8 claims must be brought under an insurance policy.

9 MS. ANDERS: I don't think there'd be more
10 -- any more lack of uniformity than there is already.
11 In fact, most of these State laws, they -- they actually
12 require plans to provide substitute language that would
13 be at least as favorable to the insureds.

14 For instance, you could have a plan -- a
15 plan could easily remedy the problem we have here by
16 saying our limitation period runs from 3 years from
17 proof of loss or 6 months from the plan's final
18 determination, whichever is -- is later. That would be
19 an easy way for a plan to both be uniform and avoid the
20 problem that we have here, which is undermining ERISA's
21 remedial framework by setting the two --

22 JUSTICE SCALIA: But it hasn't undermined
23 the framework. I mean, Petitioner had a year. I mean,
24 I can understand if -- a finding that a particular case
25 is -- is not filed too late when indeed there was --

1 there was no time to do it. But here they -- they had a
2 year. Why -- why does that undermine the framework? If
3 and when they don't have enough time, the court can say
4 the -- this suit is not precluded.

5 MS. ANDERS: Well, in this case we now know
6 post hoc that -- that the Petitioner had about a year.
7 But the problem with this framework is that it actually
8 sets the required exhaustion procedure under 1133 and
9 the required judicial review under 1132 against each
10 other, because a claimant who is going through
11 exhaustion is not going to know while she's going
12 through the exhaustion process how much time she's going
13 to have remaining.

14 JUSTICE SCALIA: So what? `

15 JUSTICE KAGAN: What evidence do you have
16 that any bad incentives -- you know, any bad effects are
17 actually flowing from this? There's actually a big
18 leeway in this statute, because it's 3 years. The
19 administrative review process only takes about a year.
20 Even if this is a -- it's a complicated case where
21 there's some tolling, you know, maybe it gets you up to
22 another year, you still have a year.

23 I mean, what -- how would people behave
24 badly or behave in ways that you think would disrupt the
25 statutory scheme, if we just let everything stay as it

1 is?

2 MS. ANDERS: Well, first, I think there is
3 evidence that there have been -- that there have been
4 problems created by this kind of scheme. There's an
5 example of a case in which exhaustion took 4 years.
6 This is an iterative process; the Department of Labor's
7 regulations, of course, mean for mainstream cases to be
8 resolved in about a year. But you can always have cases
9 -- you know, these are situations in which you need
10 medical exams, you need test results, you need written
11 reports. Either side --

12 JUSTICE GINSBURG: How -- in practice -- in
13 practice, how often is that the case that the -- that
14 the guidelines set by the Department of Labor are not --
15 are not met?

16 MS. ANDERS: I don't have precise
17 statistics, but the regulations are designed to be
18 flexible, precisely because there will often be cases in
19 which one or the other side will need an extension. And
20 so there are many cases or at least there are some cases
21 here where -- where if the limitations period is 3
22 years, it takes -- it has taken over 2 1/2 years for
23 exhaustion to occur, so the -- the plaintiff is left
24 with about 5 months to sue. And then there's a question
25 about whether that's reasonable or not which leads to

1 collateral litigation. There are some cases where the
2 statute of limitations is only 1 or 2 years.

3 JUSTICE SOTOMAYOR: Counsel, I could be more
4 troubled by this case if the proof of loss provision
5 required a suit to be brought in a year because as I'm
6 adding up the timeframe, it's about 15 months if no
7 exceptions remain for the administrative process.

8 Could you answer my question on whether you
9 see any impediment if we rule against you in this case,
10 to the department saying something like, you've got to
11 give at least a year, from the finality of the
12 administrative process? Could you pass such a
13 regulation later?

14 MS. ANDERS: I think the Department of Labor
15 would have that authority to do that. And we think the
16 statute is clear right now that, you know, several
17 provisions -- there are several concepts here that I
18 think are very clear. One is mandatory exhaustion in
19 the statute. Two, Congress enacted the statute against
20 the traditional limitations rule, which means that the
21 statute runs from the date of accrual, and deviating
22 from that would undermine the structure by causing the
23 limitations provision to work in a way that limitations
24 provisions never do. Limitations provisions are
25 designed to create certainty for both parties, so that

1 you know when you have to bring suit.

2 JUSTICE SCALIA: Counsel --

3 JUSTICE GINSBURG: But, Ms. Anders, the
4 question is -- there is a division in the courts of
5 appeals, and the question is: Could the Department of
6 Labor, by regulation, resolve the matter one way or the
7 other?

8 Does -- even if -- even if it thinks the
9 statute is clear, the courts obviously don't because
10 most go the other way. So given that most courts go the
11 other way, does the Department of Labor have authority
12 to adopt a -- a regulation that would adopt the accrual
13 rule?

14 MS. ANDERS: We do think it would have that
15 authority and it has that authority because it has the
16 authority to regulate the claims process and the
17 procedures --

18 JUSTICE SCALIA: Well, that's -- that's the
19 internal claims. Do you know any other instance in
20 which -- when a suit can be brought in -- in Federal
21 court will be determined by an agency?

22 MS. ANDERS: Well, we --

23 JUSTICE SCALIA: An agency saying you've got
24 to sue within 1 year, you've got to sue within 6 years.
25 Offhand, I can't think of any, and -- and I think it

1 goes well beyond what -- what the Executive is
2 authorized to prescribe.

3 MS. ANDERS: Well, we do think the agency
4 would have the authority here because we think that the
5 statute of limitations -- when the statute of
6 limitations runs from is intertwined with the
7 effectiveness about -- of the claims procedure. So
8 because we think that the -- that having the limitations
9 provision run from before exhaustion even starts
10 undermines the efficacy of the claims procedure, the
11 Department of Labor would have the authority to protect
12 the efficacy of the claims procedure --

13 JUSTICE SCALIA: You know any other
14 instances where -- where a Federal agency has, in
15 effect, prescribed the running of the statute for the
16 courts? Maybe there are some, but I don't know of any.

17 MS. ANDERS: I can't tell you right now.
18 I'm not sure that there aren't any such provisions. But
19 we do think the department would have the authority
20 here.

21 JUSTICE KAGAN: I guess one question is, if
22 you think that you do have authority and you think that
23 the majority rule has been creating problems, why the
24 Department of Labor hasn't done that?

25 MS. ANDERS: Well, the department's focus --

1 in 2000, the last time it regulated, it chose to focus
2 on matters that were directly involved in the claims
3 process itself. It hasn't regulated since then, but its
4 position is that the statute does not permit plans to
5 deviate from bedrock limitations principles like this
6 and undermine the remedial scheme. So its position is
7 reflected in our brief and we think it could regulate.

8 JUSTICE ALITO: If we agree with you, would
9 a State legislature have the authority to pass a statute
10 setting out a particular -- a specific statute of
11 limitations for ERISA claims?

12 MS. ANDERS: I think it -- I think it might
13 have the authority to do that so long as the statute
14 were framed in a way that didn't undermine the -- the
15 remedial framework here, yes.

16 JUSTICE GINSBURG: What is your position on
17 Justice Breyer's suggestion that the trigger can be
18 proof -- when you file proof of claim, but if it happens
19 that beginning of suit at that point would -- while
20 the -- while the administrative review process is
21 underway, why not say you have to follow the time of
22 filing, but if the administrative process -- in your
23 case, the 4 years -- took 4 years -- just hold the suit
24 in abeyance until the administrative process is
25 complete?

1 MS. ANDERS: I think that would be kind of a
2 bizarre scheme that would turn the exhaustion process
3 and the point of exhaustion on its head, and that
4 essentially would require a rush to court by claimants
5 who don't know yet whether the exhaustion process will
6 be resolved in their favor. And the point of exhaustion
7 is -- is to avoid unnecessary suits like that.

8 So I -- I think it has that problem. It
9 also is not clear that every claimant is going to know
10 to -- to file a protective suit.

11 JUSTICE BREYER: -- our saying that, and
12 what about our saying to the courts as a judge-made
13 doctrine, exhaustion has to conclude in enough time so
14 that they have time left to file a lawsuit?

15 MS. ANDERS: I'm sorry. If you were to rule
16 that --

17 JUSTICE BREYER: Yes. Because isn't --
18 isn't exhaustion a judge-made doctrine?

19 MS. ANDERS: It is a judge -- it is a
20 judge-made doctrine, but I think --

21 JUSTICE BREYER: It would be an unfair
22 process that doesn't leave them a reasonable amount of
23 time to file a lawsuit.

24 MS. ANDERS: Well, I think in this case
25 exhaustion is -- is established by statute, it's

1 required by statute and by the regulations. And so, you
2 know, I think -- I think in this case the problem is
3 that the statute of limitations starts running well
4 before the exhaustion process is complete, and
5 therefore, damages the efficacy of that process.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Carroll.

8 ORAL ARGUMENT OF CATHERINE M.A. CARROLL

9 ON BEHALF OF THE RESPONDENTS

10 MS. CARROLL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 Subject to State insurance law, ERISA gives
13 employers broad leeway to choose the terms on which they
14 agree to provide benefits, and the suits for benefits
15 due under an ERISA plan can seek only to enforce those
16 agreed-upon terms.

17 JUSTICE SCALIA: They don't have to provide
18 benefits at all, do they?

19 MS. CARROLL: Exactly. But one of
20 Congress's purposes --

21 JUSTICE SCALIA: And if they do, they do it
22 on their own terms.

23 MS. CARROLL: That's correct,
24 Justice Scalia. And that was one of Congress's
25 overarching purposes in enacting the statute.

1 JUSTICE BREYER: I suppose the problem here
2 is that we have found nine cases -- you know, we can do
3 computer-assisted research, which my clerks are good
4 at -- and -- and they found five cases in which the
5 exhaustion period was actually longer than the 3-year
6 statute of limitations. And then they found four others
7 that there -- well, there was like 5 days left in one,
8 and there was 5 months left in another. And in most of
9 -- almost all those cases, the judge got around the
10 problem by saying the statute begins to run at the time
11 the exhaustion is finished.

12 Now, I can think of other ways of solving
13 the problem. One was, you get a reg. Another way was
14 that we interpret the exhaustion doctrine to require
15 leaving at least a year. But what's your way of solving
16 the problem? Are you just going to let those nine
17 people just -- they can't bring their lawsuit, or what?

18 MS. CARROLL: Well, I think when those
19 situations arise -- and to be clear, we have 40, almost
20 40 years of experience under ERISA of these provisions
21 coexisting with the ERISA remedial framework. And in
22 that time period, to come up with, I recall, was it five
23 or nine cases --

24 JUSTICE BREYER: The question was, what do
25 you want to do with those nine people? Now, I know

1 there are a lot of ERISA cases, but still there were
2 nine people --

3 MS. CARROLL: Of course.

4 JUSTICE BREYER: -- who will have this
5 problem. And my question is, what do you suggest we do
6 about them?

7 MS. CARROLL: In the highly unusual
8 circumstances where those situations arise, and we don't
9 have any reason to believe they are anything but highly
10 unusual, we think courts are well equipped to apply the
11 same equitable doctrines that courts have always applied
12 to statutes of limitations when situations like that
13 arise. I think my friend referred to --

14 JUSTICE BREYER: My question was, what
15 specific doctrine or -- I saw three groups. Now, you
16 can name some others, and we do about those nine people
17 precisely, not in some general terms, but we do what
18 about them?

19 MS. CARROLL: In the Lamantia case cited in
20 the reply brief, the doctrine that was applied was
21 equitable estoppel because in the facts of that case you
22 couldn't get to a four-year point without a final
23 decision without something having gone wrong. And in
24 that case there was --

25 JUSTICE BREYER: And now, I suppose -- so we

1 could use equitable estoppel, even though nobody has
2 said anything, even though nobody held out anything as a
3 basis for estoppel. But we could say use equitable
4 estoppel. I'll think about that one.

5 Is there any other thing we could use?

6 MS. CARROLL: There are many. I want to
7 be clear. Estoppel applies where the facts support it,
8 as do equitable tolling, as do the several provisions in
9 the Department of Labor regulations that already account
10 precisely for the interaction between the internal
11 review process and --

12 JUSTICE SCALIA: Why wouldn't equitable
13 tolling apply if you don't have enough time to prepare
14 the court suit? You have just a month, let's say, and
15 it's not your fault because you pursued the
16 administrative proceedings vigorously and promptly. Why
17 wouldn't it be?

18 MS. CARROLL: I think it very well might,
19 Your Honor. I don't see any reason why that is not a
20 perfectly adequate solution.

21 JUSTICE SCALIA: So these seven people, nine
22 people -- how many were there? Over 40 years, they
23 probably had a way out?

24 MS. CARROLL: I think that's right. And I
25 think --

1 CHIEF JUSTICE ROBERTS: So you're pushing
2 this start to the statute of limitations period, and
3 your answer to the problems is: Well, don't worry. If
4 it ever turns into something that's going to be
5 enforced, we won't enforce it, or it won't be
6 enforceable without a judicial determination about
7 equitable estoppel and all these other things that are
8 very difficult to apply.

9 MS. CARROLL: Our position is that this
10 limitation provision, like any limitation provision,
11 whether contractual or statutory, is subject to
12 equitable doctrines that might apply on the facts of a
13 particular case. These are not novel doctrines that
14 courts are unaccustomed to applying and we don't think
15 that they are particularly difficult.

16 JUSTICE KAGAN: Ms. Carroll, what would you
17 think if the State here just amended its statutes
18 tomorrow and said not 3 years but 18 months? So for
19 everybody, it's an 18-month period. It doesn't give
20 people very long after the 12 or 13 months of the
21 administrative review process is over. What should a
22 court do then? Should a court strike the entire
23 statute?

24 MS. CARROLL: Strike the -- strike the State
25 statute?

1 JUSTICE KAGAN: Yes. Should the court say,
2 that's unreasonable, that goes too far?

3 MS. CARROLL: I mean, I -- going back to the
4 preemption analysis that Justice Alito referred to, I
5 think that provision would clearly fall within the
6 savings clause, and the thrust of this Court's ERISA
7 implied conflict preemption cases has been to ask only
8 whether the State law purports to supplement or displace
9 the exclusive remedial scheme under ERISA. And I don't
10 think that provision would.

11 Now, maybe there would be a new analysis we
12 would have to ask, which is, does this provision provide
13 a reasonable opportunity for full and fair review, and
14 does it practically deprive claimants of the opportunity
15 to obtain judicial review at the end of that period.
16 And maybe we would have --

17 JUSTICE KAGAN: I'm sorry. You know what?
18 Take it out of the statute context. Just say that the
19 contract said 18 months rather -- so -- so that's really
20 what I meant. What is -- what's a court to do with a
21 contract that says that?

22 MS. CARROLL: I think -- I think we would
23 apply that same analysis of asking, has there been a
24 reasonable opportunity for full and fair review, and has
25 the claimant been deprived of the opportunity to seek

1 judicial review?

2 JUSTICE KAGAN: Well, but in 18 months. And
3 so 18 -- the administrative review process takes about
4 12 months in most cases.

5 MS. CARROLL: Yes.

6 JUSTICE KAGAN: Is 18 months enough?

7 MS. CARROLL: I think that would be a much
8 harder case because I do think we -- I think our -- our
9 experience with ERISA provisions generally does suggest
10 that exhaustion can take, you know, usually about a
11 year, maybe a little over a year. And so that would be
12 a harder case.

13 It's not what the laws of the vast majority
14 of States do require, though. And it's not the
15 provision that's in this policy. And I think just as
16 there can be line-drawing in that direction, there could
17 be line-drawing questions asked of my friend, what if --

18 JUSTICE KAGAN: Well, what's the rule of
19 law -- what's the rule of law that allows to get rid of
20 a contract provision that's set at 14 months or
21 15 months or 16 months and to leave this one?

22 MS. CARROLL: Well, I don't want to -- if
23 I -- if I -- if I suggested that I wanted to completely
24 concede that, I misspoke because I think it's a hard
25 question. I'm not sure what the answer is. But I think

1 the applicable --

2 JUSTICE KAGAN: I was thinking that I would
3 like to -- like, 14 months would just seem unreasonable
4 to me.

5 MS. CARROLL: Okay. Well, I think that's --
6 I mean, going back to the Riddlesbarger decision and
7 Wolfe, this Court has long recognized the common law
8 principle that contracting parties may agree to a
9 limitations provision, it must be consistent with the
10 statutory framework, and it must provide a period of
11 time for suit that's not unreasonably short. And I
12 think the Court could apply --

13 JUSTICE BREYER: There, your opponent is
14 saying, I have a simpler answer. I mean, instead of
15 having to worry whether 14 months is too long or
16 7 months is too short or a year and a half is adequate
17 time, instead of having to worry about that in difficult
18 cases, I have a simpler idea. We will just run the
19 three years from the time the -- the internal exhaustion
20 is finished. Then you don't have to worry about it.
21 You don't have to worry about equitable tolling, and you
22 don't have to worry about all this other stuff. That's
23 their point.

24 MS. CARROLL: Justice Breyer, the question
25 before the Court is not what would be the best idea or

1 the best, most simple model if we were writing on a
2 blank slate. The question is, is this term in an ERISA
3 plan, in a suit from which the Petitioner's rights flow
4 from that plan and her cause of action seeks to enforce
5 the terms of that plan -- may that provision be excised
6 from every plan in which it appears in all cases on a
7 categorical basis because we can imagine the possibility
8 of five or nine cases in which its operation had to be
9 addressed through the application of traditional
10 equitable doctrines.

11 JUSTICE ALITO: Why would -- why would
12 employers with ERISA plans be hurt by the rule that the
13 Petitioner is advocating going forward? Why wouldn't
14 they just be then able to amend the plan; make the --
15 the period for filing suit begin on the -- at the end of
16 the review process, shorten the period, if -- so as to
17 bring it in line with basically what happened before,
18 when the period began upon the proof of loss, I don't
19 quite understand why, going forward, that is -- is a
20 disadvantage to -- to employers?

21 MS. CARROLL: I do think that the current
22 wording of the provision has a lot to recommend it, and
23 that's why you see it used as the typical model in
24 insurance. And here are a couple of the things. One is
25 that --

1 JUSTICE ALITO: The current model being the
2 proof of loss?

3 MS. CARROLL: Being proof of loss. And that
4 is --

5 JUSTICE ALITO: And why is that preferable?

6 MS. CARROLL: That is because, from the
7 moment the claim is filed, we know at the outset that
8 the claim -- the books can be closed on the claim for
9 reserving purposes three years from the proof of loss
10 date. Whereas, under a limitation period that does not
11 commence until the conclusion of the administrative
12 process, we won't know from the outset when the
13 limitation period will run or not.

14 And so this provision provides some
15 certainty that the other type of provision doesn't. I'm
16 not saying --

17 JUSTICE GINSBURG: Isn't it true that in
18 insurance contracts, generally, where there is this
19 proof of loss as the trigger, there isn't a mandatory
20 administrative -- most States don't have this mandatory
21 administrative review.

22 MS. CARROLL: Justice Ginsburg, that's
23 actually not correct, and we've provided some examples
24 at pages 20 to 21 of the red brief that show how these
25 provisions do commonly work in the traditional insurance

1 context. And what you commonly see is a limitation
2 period, often about 12 months, that will run from the
3 time of the insured loss, let's say the time of the fire
4 in a fire insurance policy.

5 What subsequently must happen within that
6 12 months is that the claimant must present proof of
7 loss within the 12 months as the clock is ticking.
8 Sometimes they must await the insurer's decision.
9 Sometimes they simply have a waiting period. And then
10 they have to file suit. And that was the -- that was
11 the scheme that this Court discussed at some length in
12 the Wolfe case.

13 And what that model is about is -- I mean, I
14 think we're all very familiar with the kind of Federal
15 administrative scheme where there are several steps of
16 administrative review, followed by a judicial review
17 step, where Congress writes a limitation period that's
18 essentially a grant of time in which a claimant can
19 proceed from one step to the next.

20 But that's not the only model, and it's not
21 the model that characterizes the insurance practice.
22 With that model -- the way that often works is there is
23 a deadline out there in the future, and by that deadline
24 a claimant must complete the pre-litigation steps
25 necessary and file their claim. That's the type of

1 model that this court also considered in enforcing the
2 McMahon case. And there's nothing in the law that says
3 one model versus the other is the only way a limitation
4 period can ever be written.

5 And in ERISA, Congress did not step in to
6 decide what it thought the limitation period ought to be
7 or how it thought it ought to work. It instead said,
8 number one, we want to defer to State insurance
9 regulators, even though these provisions had long been
10 on the books already, we want to defer to State
11 insurance regulators to govern the content of insured
12 plans. And number two, we want to defer to employers'
13 decisions about the terms on which they want to enter
14 into the voluntary undertaking of providing benefits.

15 And it is a voluntary undertaking and
16 Congress, speaking about concerns about uncertainty and
17 so on, the primary uncertainty that Congress was worried
18 about and that would be visited on employers and
19 insurers if this Court were to -- were to rule for
20 Ms. Heimeshoff, would be that we don't want to be in a
21 legal regime where every term in an ERISA plan is
22 potentially unenforceable because someone can imagine a
23 handful of five or nine cases in which it's unfair.

24 CHIEF JUSTICE ROBERTS: Well, but there's
25 no -- there's no employer who is going to have a plan

1 put together and say, well, I'm not going to do this
2 unless the statute of limitations for claims runs from
3 the proof of loss. And if you tell me it's got to run
4 from the exhaustion of remedies, I'm just not going to
5 give a benefit plan. That's an implausible scenario.

6 MS. CARROLL: I -- I think that it's a
7 broader point, however, in terms of the uncertainty that
8 this would raise. To -- to say that this provision
9 should be excised from ERISA plans in all plans where it
10 appears, for all cases because of speculation about what
11 might happen in some cases but does not usually happen,
12 to say that that can be a basis, absent any other anchor
13 in the statute, for judicially rewriting or ignoring
14 plan terms, would be a tectonic shift in the law of
15 ERISA in terms of Congress's goal of making sure that
16 plans would be enforced as written, particularly in a
17 cause of action under Section (a)(1)(B), which is a suit
18 not to defeat the plan terms, but to enforce the plan
19 terms.

20 JUSTICE SOTOMAYOR: Well, what would your
21 argument be if -- if this -- if ERISA said there is a
22 minimum 3-year statute of limitations? Would your
23 argument be identical today or would that be a clearer
24 demonstration that Congress intended that the background
25 principle that that starts from, the exhaustion of

1 administrative process, be incorporated?

2 MS. CARROLL: Under the -- under the
3 principle this Court recognized in Riddlesbarger and
4 Wolfe, parties to a contract may agree to a limitation
5 period that differs from one in the governing scheme.
6 So, for example --

7 JUSTICE SOTOMAYOR: So do you require an
8 explicit agreement that the start is going to be
9 different as well?

10 MS. CARROLL: An explicit agreement --

11 JUSTICE SOTOMAYOR: That you can shorten or
12 lengthen a limitations period, but this is not about
13 shortening or lengthening a limitations period. This is
14 about changing a start time for the limitations period.

15 Do you require something explicit -- an
16 explicit statement as to that as well?

17 MS. CARROLL: Your Honor, if I am
18 understanding the question correctly, I think if you --
19 if you begin from the premise, as I think all parties
20 do, that -- that contracting parties may agree to the
21 length of the limitation period --

22 JUSTICE SOTOMAYOR: Right.

23 MS. CARROLL: A limitation period -- a
24 length of a limitation period can't be defined or
25 expressed without reference to some starting point.

1 It's not the norm to say, oh, we're going to have a
2 3-year period. You would say it's 3 years from some
3 date. It's 3 years from proof of loss or 3 years from
4 notice or 3 years from discovery or 3 years from my
5 decision --

6 JUSTICE SOTOMAYOR: So you think Congress
7 would only legislate in that way?

8 MS. CARROLL: I'm sorry?

9 JUSTICE SOTOMAYOR: You think Congress would
10 only legislate that way? Do you have any examples of
11 that, of Congress saying the limitations period starts
12 at the end of the administrative process and is for 3
13 years or 1 year?

14 MS. CARROLL: Well, typically, Congress
15 writes limitations periods that run from the time the
16 "cause of action," accrues, which is why this Court --

17 JUSTICE SOTOMAYOR: That's much better.

18 MS. CARROLL: -- usually has to decide when
19 the cause of action accrued. But that's not always the
20 case. So in the Dodd case, for instance, the limitation
21 period in the Federal habeas statute is not drawn to
22 anything having to do with accrual, but to a -- a menu
23 of a series of particular events.

24 And the same thing is true under this
25 provision where the parties, rather than defining the

1 limitation period by reference to the accrual of a cause
2 of action, they have defined it by reference to a
3 particular point in time, which is a model that is
4 common in -- in the insurance practice and has been
5 widely used in ERISA plans since ERISA's enactment.

6 JUSTICE SCALIA: Do you have any position on
7 whether the executive can prescribe when -- when suit
8 must be brought?

9 MS. CARROLL: I -- here's how the Department
10 of Labor has threaded that needle, and that is in the
11 provisions of the regulations that say things like, if
12 an ERISA plan provides for additional voluntary appeals
13 beyond the minimum that's necessary, then the plan must
14 agree to -- not to assert any defense based on the
15 statute of limitations or timeliness. And so I think
16 that sort of approach is probably something that they
17 could do. I mean, I think that probably avoids the
18 question that Your Honor was asking earlier.

19 I think, you know, as far as the DOL's
20 regulatory authority more generally, I think there is
21 also the looming question about whether the Department
22 has statutory authority to adopt a regulation that would
23 have the effect of preempting State law.

24 But leaving those authority questions aside,
25 I think the only other question is whether the

1 Department could compile a factual record that would
2 provide a non-arbitrary basis for taking this action.
3 I -- I'm not sure that they could, but it's certainly
4 within their right to initiate notice and comment
5 rulemaking to try to do that.

6 JUSTICE GINSBURG: Ms. Carroll, did I
7 understand you before to be taking the position that
8 even if Congress enacted a statute of limitations with
9 an accrual rule, that that might not be effective as
10 against a plan provision that provides for the trigger
11 being proof of claim?

12 MS. CARROLL: I -- I think it would be a
13 question of statutory interpretation there whether the
14 inclusion of a particular statute of limitations was
15 meant to limit contracting parties' ability to agree to
16 a different one. And I think if you had a situation
17 where, you know, let's say the Court in this case
18 upholds the plan's provision and then Congress amends
19 the statute to say, you know, we really think this
20 doesn't make sense and we want to have a different rule,
21 I think there would be a strong argument that that
22 statute was intended to foreclose, as Congress may do,
23 the right of -- of parties to contract around that rule.

24 JUSTICE SCALIA: They're not going to do
25 this for a lobby of nine people, are they?

1 MS. CARROLL: I -- I wouldn't expect so.

2 JUSTICE BREYER: But if they do that, the
3 question answers itself. The -- the --

4 (Laughter.)

5 JUSTICE BREYER: The -- the question I would
6 like to know is if you know empirically, roughly, what
7 are typical statutes of limitations in this area? The
8 basic rule is State law unless contract, is that right?

9 MS. CARROLL: I -- I think that's right,
10 yes.

11 JUSTICE BREYER: And how long on average?
12 Do you have any idea of -- of how long people normally
13 have to bring their action?

14 MS. CARROLL: Well, the 3 years from proof
15 of loss is the standard provision. So that is typical.

16 JUSTICE BREYER: It's the standard provision
17 in contracts?

18 MS. CARROLL: Yes. In -- in certain types
19 of insurance contracts, yes.

20 JUSTICE BREYER: Well, I mean -- in certain
21 types of insurance contracts. So ERISA is all over the
22 place. I wouldn't even know where to start. Does the
23 Department of Labor keep statistics on this or what?

24 MS. CARROLL: I -- I have -- I -- we have
25 looked far and wide for empirical information about this

1 and the best I can do is to refer Your Honor to page 29
2 of the amicus brief for the American Council of Life
3 Insurers, which does collect a little bit of empirical
4 information about the exceeding rarity with which this
5 issue ever arises in ERISA cases and the typical length
6 of time that's required to exhaust.

7 CHIEF JUSTICE ROBERTS: Well, it's hard to
8 see what you mean by the exceeding rarity. I suspect
9 there are more than nine cases where people are looking
10 at the running of the statute of limitations and they're
11 saying, well, I've got to sue if I don't get this and
12 when do I have to hire a lawyer. And the last thing you
13 want in this process is to get lawyers involved at the
14 claim procedure. And they say, well, there's only 10
15 months left, I'd better hire a lawyer, you know, and
16 instead of the informal resolution, you've suddenly got
17 lawyers involved. Why isn't that a legitimate concern?

18 On the other hand, if you wait until the
19 claim is exhausted, you may -- you may not need the
20 lawyer at all. But if you don't know when that period
21 is going to run, you'd better get one early -- sooner
22 rather than later.

23 MS. CARROLL: Well, of course in this case,
24 the Petitioner did have counsel from relatively early on
25 in the process.

1 CHIEF JUSTICE ROBERTS: Well, she was very
2 prudent.

3 MS. CARROLL: So I'm not sure that --
4 Pardon?

5 CHIEF JUSTICE ROBERTS: I mean, she didn't
6 know when it was going to run, you'd better get somebody
7 in there right away. The typical lay person who's got a
8 claim for \$9,000 in disability benefits or whatever, you
9 know, may not know. Better get a lawyer to tell her.

10 It just seems to me that you keep it as an
11 informal resolution -- inexpensive resolution process if
12 you tell somebody look, you don't have to worry about
13 getting a lawyer until we tell you whether we're going
14 to deny your claims or not.

15 MS. CARROLL: And, Your Honor, that easy,
16 inexpensive process is how it works in the vast majority
17 of cases. I think something like 80 percent of
18 disability claims are granted through the internal
19 review process without there ever being any need to go
20 to litigation. And I think the reason --

21 CHIEF JUSTICE ROBERTS: Well, that's my
22 point. I'm not talking about the need to go to
23 litigation. I think there are probably more than 9
24 people who had to hire lawyers before they even had a
25 decision.

1 MS. CARROLL: Oh, I think that's right. I
2 mean, this is not -- I think our best sense is that
3 there's something around the order of about a quarter to
4 a third of cases in which claimants are represented by
5 counsel. But I think the question that Your Honor is --
6 is posing, of the claimant who's approaching some point
7 where they are wondering what to do, that's going to be
8 a claimant who's looking at a deadline for filing suit
9 that is probably still a year and a half or two years
10 away in typical cases.

11 CHIEF JUSTICE ROBERTS: Well, and it's
12 probably a claimant that doesn't have all that much
13 experience in the legal system and doesn't know how long
14 does it take, you know, to get a complaint ready and --
15 I don't know. It just seems to me that the problem of a
16 statute of limitations that runs before the claim even
17 accrues requires people to worry about their legal
18 rights in a way that -- the simple rule about when your
19 benefits are denied, that's when the period starts
20 running.

21 MS. CARROLL: Well, I mean, granted all
22 statutes of limitations do impose some obligation on
23 would-be plaintiffs to take steps to protect themselves.
24 That -- that is true of all limitations periods no
25 matter how they are drawn.

1 JUSTICE KENNEDY: It's fair to say, in other
2 words, that it's typical in the insurance industry that
3 statute of limitations run from proof of loss?

4 MS. CARROLL: In the group -- in the group
5 benefit plans of the type that are subject to ERISA,
6 that is very common. That is the standard term. Going
7 back to the older products like fire insurance, life
8 insurance, and so on, it would often run before proof of
9 loss, from the actual insured event.

10 JUSTICE KENNEDY: From occurrence?
11 Occurrence --

12 MS. CARROLL: Exactly. Exactly. And with
13 -- the reason why it's different in a long-term
14 disability plan is that you have to make sure that the
15 disability is actually a long-term disability. And so
16 that's why you have these elimination periods followed
17 by a proof of loss deadline because there has to be a
18 sustained disability in that interim period. And so you
19 don't run it from an earlier point because it's not
20 clear that the insured event has occurred until you've
21 come to that point.

22 JUSTICE ALITO: Well, you started to answer
23 this question before, but I'm not sure I understand the
24 answer, why this proof of loss model is -- is so
25 attractive in the disability insurance field? You said

1 that it provides a clear date on which you know you can
2 begin to count. But so does an accrual rule. So maybe
3 you can explain a little bit more.

4 MS. CARROLL: I -- I think what I meant by
5 that was under what I take Your Honor to mean by an
6 accrual rule, meaning a limitation period that runs --

7 JUSTICE ALITO: Right, right.

8 MS. CARROLL: -- at the conclusion of the
9 administrative process, we don't know at the time that
10 the claim is initially presented when that's going to
11 be. Is it going to be 6 months from now? A year from
12 now? A year and a half from now? And so it's simply
13 for reserving purposes, it helps to have a greater sense
14 of certainty about the timing of potential claims and
15 when we can close the books. -

16 JUSTICE BREYER: It's -- the doctrine of
17 exhaustion is a judge-created doctrine.

18 MS. CARROLL: Correct.

19 JUSTICE BREYER: And therefore you cannot,
20 in your contract, contract yourself around it. You
21 can't get out of it.

22 MS. CARROLL: No. And --

23 JUSTICE BREYER: So what this would require
24 would be to say that that judge-created doctrine
25 requires exhaustion to take place before the accrual of

1 the statute of limitations, end of opinion. For the
2 reason of certainty, for the reason of uniformity, for
3 the reason of avoiding, through hiring lawyers, et
4 cetera, an interference with the voluntary nature,
5 simple nature, and hopefully pre-legal involvement
6 nature of that exhaustion process, all right? Da, da,
7 da.

8 Now, the reason -- what trouble would that
9 cause?

10 MS. CARROLL: The --

11 JUSTICE BREYER: What trouble in the
12 industry would that cause?

13 MS. CARROLL: The -- that trouble -- that
14 would cause trouble for every employer, plan sponsor,
15 insurer that has an ERISA plan. And here's why. Since
16 ERISA's enactment, this Court has never held that in a
17 suit to enforce the terms of an ERISA plan those terms
18 can be thrown out the window because we worry that they
19 might be unfair in some case that we can speculate
20 about.

21 That would be a very significant shift in
22 how this Court enforces ERISA plans, and it would
23 undermine Congress's goal of wanting to assure employers
24 and plan sponsors that the terms on which they agree to
25 provide benefits will be respected.

1 JUSTICE SCALIA: I thought that this
2 contract required exhaustion of administrative remedies
3 before you can sue. Isn't that in the contract?

4 MS. CARROLL: It is.

5 JUSTICE SCALIA: So it's not a judge-created
6 doctrine.

7 MS. CARROLL: It's --

8 JUSTICE SCALIA: I mean, we create it in
9 other instances where -- where there are agency, you
10 know, requirements to go through the agency, and we --
11 we make it up. But here it's -- it's in the contract,
12 isn't it?

13 MS. CARROLL: It is in the contract.

14 JUSTICE SCALIA: So we are not as entitled
15 to fiddle with it as much as we are when it is our
16 creation, I suppose.

17 MS. CARROLL: Well, but even when it is the
18 Court's creation it is not without exceptions, it is not
19 jurisdictional. We like exhaustion. We think -- we
20 think that internal review is a very successful and
21 workable scheme that resolves the vast majority of cases
22 with mutual benefits to all sides.

23 JUSTICE KAGAN: Ms. Carroll, please tell me
24 if I'm wrong. But even if a contract does not have an
25 exhaustion requirement, courts have required exhaustion.

1 MS. CARROLL: That's -- that's correct, for
2 good reason, although with exceptions.

3 JUSTICE KAGAN: And courts have required it
4 even though the statute doesn't say so.

5 MS. CARROLL: That's true.

6 JUSTICE KAGAN: It's an extra-textual
7 requirement the courts have made up, irrespective of
8 what the contract provides.

9 MS. CARROLL: That's true. But it is not
10 one that required setting aside or defeating any term of
11 an ERISA plan. And that's the key distinction.

12 CHIEF JUSTICE ROBERTS: Did I --

13 MS. CARROLL: And as the party that has come
14 forward to say that even though I am trying to enforce
15 this plan, I nevertheless want to jettison the plan
16 terms, I think the Petitioner bears a burden to say
17 there is some anchor in the statute or some basis in
18 evidence or experience to say, not simply to speculate,
19 that there is a potential clash with the remedial
20 scheme, but that there is one.

21 JUSTICE KAGAN: I think what Justice Breyer
22 was suggesting, that maybe, given that we have this sort
23 of judge-made rule of exhaustion, that the courts just
24 did sort of a half job of it, that they also should have
25 put the statute of limitations that makes that

1 exhaustion requirement work, and that ensures that it
2 doesn't produce unfair, bad outcomes.

3 MS. CARROLL: I think if there is a -- if
4 there is a question as between a judge-made doctrine and
5 the terms of a plan as to which should give way, I think
6 Congress has made clear that it is the terms of the plan
7 that ought to control, as have the courts made clear.

8 JUSTICE KAGAN: The Congress was dealing --
9 you know, Congress passed ERISA before this exhaustion
10 requirement came into play. So it's a little bit hard
11 to read into anything, to read Congress's silence in the
12 normal way here because Congress didn't think that there
13 was going to be this exhaustion requirement --

14 MS. CARROLL: I --

15 JUSTICE KAGAN: -- and the courts put it on
16 later.

17 MS. CARROLL: I'm not sure about that. I
18 think the courts that found an exhaustion requirement
19 did so in an act of statutory interpretation and found
20 that to be consistent with Congress's intent in the
21 statute.

22 CHIEF JUSTICE ROBERTS: Did I understand --
23 did I understand you earlier to say we have not had a
24 case where we have overridden plan terms in ERISA plans?

25 MS. CARROLL: In a -- in a suit under

1 section 1132(a)(1)(B) to enforce a plan term, there is
2 no decision in which this Court has said we can simply
3 ignore plan terms.

4 CHIEF JUSTICE ROBERTS: Well, simply ignore.
5 I mean, is there any in which we have overridden plan
6 terms?

7 MS. CARROLL: No.

8 CHIEF JUSTICE ROBERTS: No.

9 MS. CARROLL: No. There are no -- there
10 have been plenty of cases where people have asked to do
11 so, and where this Court has had to say -- for example
12 in the -- in the Amara case, in the McCutchen case, in
13 the Kennedy case, where the Court had to consider
14 situations where maybe we should come up with a
15 judge-made sort of common law model that seems like a
16 better rule. And the Court said, no, we are not going
17 to do that because this is a situation. This is a
18 context where Congress wanted plan terms to control.

19 Here the plan terms clearly bar the suit.
20 There's no allegation that the -- the
21 administrative regime here was --

22 JUSTICE BREYER: Look, you agree that we
23 would overturn the plan term if the plan term was no
24 exhaustion?

25 MS. CARROLL: I'm sorry?

1 JUSTICE BREYER: The courts would overturn a
2 plan term which plan term said no exhaustion.

3 MS. CARROLL: I -- well, I doubt very much
4 you would ever encounter a plan term like that.

5 JUSTICE BREYER: Of course not because what
6 we are trying to do -- and employers are very
7 cooperative and we are trying to work out a system with
8 the exhaustion thing that will not destroy ERISA plans
9 or something.

10 MS. CARROLL: Right.

11 JUSTICE BREYER: It -- it's which is the --
12 and that's why I phrased it in terms of an explanation
13 of the exhaustion requirement.

14 MS. CARROLL: Yes. I suppose if you had an
15 intransigent plan that just said, no, we refuse to
16 entertain your attempts to appeal, that is a situation
17 where a court would apply one of the futility exceptions
18 to exhaustion. So I -- I don't think that would --
19 would present an issue.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MS. CARROLL: Thank you.

22 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER,

23 ON BEHALF OF THE PETITIONER

24 MR. WESSLER: Thank you. Just a few -- a
25 few brief points.

1 CHIEF JUSTICE ROBERTS: I'm sorry, you have
2 4 minutes left.

3 MR. WESSLER: Thank you.

4 First of all, this Court has in UNUM v. Ward
5 refused to enforce a plan term that would have
6 overridden a State law notice prejudice rule. But I
7 think the bigger point here is that provisions that --

8 JUSTICE SOTOMAYOR: What case is that?

9 MR. WESSLER: UNUM v. Ward, Your Honor.

10 The bigger point here is that provisions
11 that tamper with the enforcement scheme, as this
12 provision does, are inconsistent with ERISA's remedial
13 structure. By Respondent's own argument, this is not an
14 enforce the contract provision.

15 This is a sometimes enforcing the contract
16 provision, that is itself automatically subject to a
17 reasonableness override, in which courts can and are
18 expected to actually decline to enforce the plain
19 language of the provision in cases in which it finds,
20 under a host of fact-specific questions, the provision
21 is either unreasonable or the plan is he is estopped
22 from enforcing it or has waived it.

23 And that, we submit, Your Honor, is the key
24 defect with this provision because it puts courts right
25 in the center of policing what should be a private

1 process.

2 If plans are -- if Courts are able to look
3 back and determine whether a plan's conduct in the
4 internal process was -- was unreasonable, was dilatory,
5 was unreasonably delayed, then all of a sudden the
6 private benefit resolution process, which this Court has
7 said, as have all of the lower courts that have looked
8 at it, is designed to be non-adversarial, flexible, and
9 private, turns into something that looks like none of
10 those things.

11 It turns into a process in which lawyers get
12 involved early, in which courts get involved early, and
13 in which these plan terms are subject to revision or
14 over -- overrides in a host of cases and in which both
15 plans and claimants have no idea ex ante whether or when
16 this provision will be enforced.

17 A rule running from final denial, which I
18 should say is the consistent rule across the board in
19 every Federal statutory regime, stated -- going back
20 from -- to the beginning of the law that we have been
21 able to find, runs the limitations clock from when you
22 can file the claim in court.

23 JUSTICE ALITO: Well, if we agree with you,
24 would the Federal courts and maybe ultimately this Court
25 in the end have to specify what the statute of

1 limitations is, the length of time? So we have a bunch
2 of cases from different courts, and one circuit says 2
3 years is -- is the -- that's the shortest you can have.
4 Another one says, no, you can have a year. Another one
5 says, well, you could have 9 months.

6 How would this ultimately happen? Wouldn't
7 we be driven to that?

8 MR. WESSLER: I -- I think not. I think
9 plans have absolute authority to -- to themselves
10 specify the length of the period. We see this --

11 JUSTICE ALITO: They specify a lot of
12 different lengths, and then they're all challenged --
13 different ones are challenged in different courts, and
14 the courts have to say what's reasonable. And there's
15 no State statute of limitations that applies to this
16 situation. So it all comes down just to a question of
17 reasonableness.

18 MR. WESSLER: I think that -- I think two
19 answers to that, Your Honor. First, I don't think
20 that's actually correct. Most plans that run the length
21 only do about a one year from -- from final denial.

22 As Respondents themselves have -- have
23 explained, and we agree, courts across the board find
24 one year in almost every context to be reasonable. And
25 so it would automatically be enforced.

1 But the difference also is in the type of
2 reasonableness inquiry that a court would have to apply
3 in -- in the case that you're suggesting, which is not a
4 fact-specific inquiry based on how long the parties took
5 to pursue this internal process. It's simply an
6 objective question. Is the amount of time on the
7 limitations clock enough to allow a plaintiff to file
8 her claim in court?

9 And one month -- excuse me. One year from
10 final denial would absolutely be enough time, would
11 provide all parties under ERISA with the certainty that
12 they have to -- to file their claim.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 12:03 p.m., the case in the
17 above-entitled matter was submitted.)

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